CLIENT ALERTS

Is Michigan the next state to ban or limit non-competes?

9.5.2019

As discussed in previous client alerts, the efforts to outright ban and/or severely limit the use of non-compete agreements have gained steam nationwide with several states having already passed sweeping legislation. What about Michigan? It was only a matter of time before certain players in Michigan would jump on the bandwagon.

In 2015, State Representative Peter Lucido (R-Washington Township) introduced legislation (HB 4198) that sought to outright ban non-compete agreements in Michigan. There were no co-sponsors on the bill and it never passed (nor did it even make it to a vote). Rep. Lucido tried to introduce new bills in 2016 (HB5311) and 2017 (HB4755) but redirected his efforts to only banning non-compete agreements with respect to "low-wage" employees while imposing several other requirements regarding the enforceability of other non-compete agreements. Those bills, like the first one, never passed and nothing of significant substance on the issue was introduced in 2018.

On July 15, 2019, Michigan's Attorney General, Dana Nessel, joined in a multi-state effort urging the Federal Trade Commission (FTC) to take a harder line against non-compete and no-poach agreements and use its federal agency powers to interfere with state contractual rights and treat these agreements as potential violations of the Sherman Act. They argued that the agreements can harm workers by limiting their employment options and ability to seek higher-paying jobs.

Just over a month later, on August 29, 2019, actual legislation (HB 4874) was introduced to amend Section 4a (MCL 445.774a) of the Michigan Antitrust Reform Act. Specifically, HB 4874 seeks to make the following significant changes to Michigan's non-compete laws:

- The bill prohibits employers from requesting or obtaining a non-compete agreement from an employee or applicant

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who is, or would be hired as, a "low-wage employee." A "low-wage employee is defined as an employee who receives compensation (excluding overtime compensation) at a rate less than the greater of (a) $15 per hour, (b) 150% of the minimum hourly wage established under Section 4 of the improved workforce opportunity wage act, MCL 408.934, or (c) annual compensation of $31,200 adjusted for inflation. A non-compete agreement obtained in violation of this section is void and unenforceable as a matter of law.

- The bill allows the attorney general to bring an action to enforce the above-referenced requirement and impose civil fines up to $5,000 for each employee who is the subject of a violation.
- With respect to all other employees or applicants, an employer is precluded from obtaining a non-compete agreement unless it has (a) provided applicants with written notice of the requirement for a non-compete agreement, (b) disclosed the terms of the non-compete agreement in writing before hiring the employee, and (c) posted this act or a summary of its requirements in a conspicuous place at the worksite where it is accessible to employees. A non-compete agreement obtained in violation of this section is void and unenforceable. Furthermore, any term or choice of law provision in an agreement that purports to waive or negate the requirements of this section would be void and unenforceable.
- The bill specifies that in an action to enforce or to void or limit enforcement of a non-compete agreement, the employer bears the burden of establishing that the employee was not a low-wage employee and that the duration, geographical area, and type of employment or line of business are reasonable.
- The court may void an unreasonable agreement or limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. However, if the court voids or limits the non-compete agreement, the court shall award both of the following: (a) To the employee and any other injured party, the actual costs of the action that were necessary to defend against enforcement of the non-compete agreement or to void or limit the agreement, including, but not limited to, reasonable attorney fees, and (b) To the employee, all income lost as a result of actual or threatened enforcement of the void non-compete agreement or the unreasonable terms of the non-compete agreement.

The full text of the bill can be found here.

WHAT DOES THIS MEAN FOR EMPLOYERS OR BUSINESSES WHO OPERATE IN AND/OR HAVE EMPLOYEES IN MICHIGAN?

1. Continue to monitor this legislation and the potential impact on your business. It is unlikely that this bill will become law anytime soon (or even receive a vote), but with 2020 around the corner, anything could happen.
2. Proactively review your existing non-compete agreements and analyze whether they comply with new state laws (or even proposed legislation like Michigan's HB 4874) and/or could withhold scrutiny from state and federal agencies.

3. Tailor your non-compete and/or no-poach agreements for the jurisdiction in which they are used. For example, a reasonable non-compete agreement that would be enforceable in Michigan would likely not be enforceable if the employee lives and works in California.
4. Audit your non-compete agreements on at least a yearly basis to ensure that they are compliant with any changes to state and/or federal laws. As noted above, the laws are constantly evolving and/or changing.

In the end, the message should be loud and clear. Proactively take steps to ensure that your restrictive covenant agreements will likely be held enforceable by carefully crafting them to protect your legitimate business interest and narrowly tailoring the restrictions (all the while staying in compliance with the constantly evolving laws).

Please contact the authors of this alert or any of Butzel Long's Trade Secret and Non-Compete Specialty Team attorneys regarding the latest changes in the law (including monitoring Michigan's HB 4874) and/or to help implement the recommended steps above.

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